

**Oregon Department of State Lands (DSL)**  
**Partial 404 Assumption Workgroup**

**JUNE 3, 2020**  
**9:00-12:00**

MICROSOFT TEAMS MEETING  
(access link sent in email)

**Agenda**

9:00 Introductions and review of May 2020 Update

- Summary of Update (Read Through)
  - Questions?
- Goals of today's meeting:
  - ✓ Updates
  - ✓ Project Schedule
  - ✓ Questions

9:30 Crosswalk Update (share screen)

9:45 Assumed vs. Retained Waters and Mapping Update

- Verbal agreement with Corps has been reached
- DSL will draft a MOA for Corps review
- Changes since last time
  - 50% exceedance replaces HMT (more accurate)
  - Adding State CZM boundary for DLCD coordination

10:15 Tribal Consultation Update

- As of this writing, still preparing written response to CTUIR letter of 1/15/2020
- Nine issues being addressed
  - Federal Trust Responsibility
  - Treaty Rights
  - Federal Endangered Species Act
  - Sovereign Immunity
  - State Budget Vulnerabilities
  - National Historic Preservation Act (Section 106)
  - EPA/Corps Obligations Related to 404 Assumption
  - EPA's Lack of Capacity to Review Applications
  - EPA/Corps Consultation Policy
- Natural Resources Cultural Cluster Meeting
  - DSL has asked the co-chairs of the Tribal natural resources group to schedule a meeting to discuss these nine issues

10:45 Break

11:00 ESA Update

- Draft MOA in Process
- Work Flowchart in Process
- Meeting with Corps in Process
- EPA seeks comment on Section 7 consultation for assumption:
- <https://www.federalregister.gov/documents/2020/05/21/2020-10913/request-for-comment-on-whether-epas-approval-of-a-clean-water-act-section-404-program-is>
- Comment deadline is 7/6/2020

11:30 Report to House Agricultural and Land Use Committee (HAGLU)

- DSL has begun outlining its report to be submitted to HAGLU - 2020 Legislative Days
- DSL will be responding to the following legislative direction:

General direction—**ORS 196.795** (enacted in 1995)

DSL will address the following program criteria:

1. Reduce paperwork
2. Eliminate duplication
3. Increase certainty
4. Increase timeliness
5. Enhance resource protection

Specific direction—Sections 1 and 2, Chapter 652, Oregon Laws 2019 (HB 2436) (repealed on January 2, 2021)

DSL will follow up on the report it submitted to HAGLU in November 2019 in considerably more detail, addressing the five criteria listed above as they relate to partial assumption

12:00 Adjourn

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Next Meeting is Wednesday July 1, 2020 at the Department of State Lands.



## 404 ASSUMPTION WORKGROUP ROSTER

**JUNE 2020**

ATTENDEES TO THE JUNE 3, 2020 MEETING SHOWN IN YELLOW HIGHLIGHT

RED FONT INDICATES ATTENDEE HAD NO MICROPHONE

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## 9:05 INTRODUCTIONS

**AGENDA**-DSL read through the meeting agenda

The May 2020 meeting update was posted to the DSL website.

**CROSS WALK UPDATE**

DSL gave an update on the EPA/DSL equivalency "cross walk"; submitted in April 2020 to Regional EPA and HQ EPA. EPA got back to DSL with their comments basically saying they need "more". DSL expected this response. A lot more work needs to go into this. DSL has edited and is preparing to re-submit one section of crosswalk at a time to EPA. In summary, EPA requires comparison to 40 CFR 230, 232, 233 and DSL has been matching to state ORS 196, 273, 390 and OAR 141. This will be a 200+ page document when complete.

Question: is the cross walk available? DSL responded that it will be when complete or nearly complete. It is currently in draft form and very much a work in progress. DSL hopes to share the cross walk with other states and tribes interested in 404 assumption once finished. EPA agreed the cross walk is still very draft.

Further cross walk discussion: DSL participates in ASWM meetings monthly and any information about the cross walk is frequently requested as guidance for other states going through the assumption process or considering doing so (no tribes yet); this is toughest part of the application. The point of creating this comparison is so EPA can identify where legislative and rule changes need to occur to comply with assumption.

EPA added that assumption regulations are currently being rewritten; in the process of writing rules, EPA hopes to have this done by June 2020, then it will need to go for internal review then to the public for comment, maybe in July 2020. In the meantime, DSL believes the cross walk will be helpful for navigation for whatever new requirements will be in the new 404g rule. DSL and EPA state that it is a moving target.

Question/Comment: *The Coquille tribal representative stated that tribes are not members of the public; anything out for comment needs to be sent to tribes specifically for consultation and needs enough time for review. The Coquille Tribe would like a draft for commenting.* DSL thanked the Coquille Tribe for joining the meeting today and stressed that this is not "late in the process" to join the DSL assumption effort, rather, a good time to join as DSL is developing a detailed report to submit to the legislature. DSL understands consultation with Oregon tribes will need to be ongoing.

Question: *Is there someone monitoring the chatroom?* LWVOR stated an earlier question was regarding the EPA document, not the DSL cross walk. DSL is monitoring the chatroom with two staff. DSL IT explained the chat room to attendees. EPA responded that their rules will definitely be out for public comment. EPA will encourage everyone to comment on those rules.

Question: *LWVOR asks if EPA-rules will be available by July? Other rules take 60 days for comment; is that correct? Is that the process?* EPA responded that they do not know if it will be 45 or 60 days; there is discretion within the agency; it will be at least 45 days as that is the minimum requirement.

EPA stated that they are dedicated to this particular rule and that if there is need for additional time, they may extend the deadline; EPA wants to get it right. DSL asked EPA- that now that we have tribal members at the



Workgroup meeting, what is the process for them? EPA responded that if DSL submits a 404 assumption application, tribes are afforded the opportunity to consult at the national level; just like with the Navigable Waters Protection rule; EPA is doing its best to identify tribal needs and issues that have not been addressed before.

*The Coquille tribal representative asked EPA when will this happen?* EPA doesn't know. EPA states that there was already communications to Oregon tribes to consult with EPA on state assumption and they did not receive any comments; they don't know if there will be another round on the 404 program; the Coquille Tribe reiterated that they have not been consulted on this and have not seen any communication to consult request. EPA responded that they reached out to all tribes at a national level last fall and received no comments; and communicated to tribes advance notice of rulemaking; the Coquille tribe representative asked to take this discussion offline and EPA agreed.

DSL stated that letters were sent to tribes in late 2019 asking for consultation (with DSL). Only the Cow Creek Band of Umpqua Tribe of Indians responded; DSL should reach out again and to consult in person. The Coquille tribal representative stated that a "letter" is not consultation and that the tribe receives many letters for consultation. DSL agreed that a letter is not personal consultation and stated that the next step is to attempt to consult individually again, if tribes would like to engage. DSL will be talking about the 404 assumption at the next cultural resource cluster in August and is glad to see so much interest from the Coquille tribal representative.

### **Assumed vs. Retained Waters**

DSL shared-screen of the web-based map that DSL GIS put together. Some tech difficulties; map doesn't work well thru Teams.

If a water is assumable DSL can issue a 404 permit; if retained, the Corps issues permit; UGBs are shown as delineated and activity within UGBs where DSL will be mostly issuing permits; sites=dots, 10 year history of removal fill permits. High density is generally within UGBs. Navigable waters are shown such as Columbia River; coastal zone boundary shown; this is the tool DSL has used to converse with the Corps on waters. Carrie Bond and Kristen Hafer are DSL contacts at the Corps.

EPA discussed how, in defining assumable vs. retained waters, to know when there is an adjacent wetland that is not assumable. EPA encouraged the Corps and states to develop an administrative line in your state. DSL determined a 1000 foot buffer on either side of a channel. Tidal waters are not assumable. Based on all of this, DSL will draft a MOU with the Corps to get written agreement; The Corps added that the Office of Counsel reviewed tidal data and has a caveat on the DSL map that the line as shown is not to be used to determine jurisdiction. Mean high water is what the Corp uses; so, the boundary DSL shows is for administrative uses only. This map is for convenience to see if a site is "in" or "out". DSL hopes to continue to develop other map tools like latitude and longitude for searching sites. Any MOA/MOU will be posted to the DSL 404 webpage.

Question: *What are the color categories for pink and yellow?* DSL responded. DSL has a better map in .kmz format that will be shared. The workgroup is looking at this map through Teams and it doesn't look the same...there will be a complete legend on final product.

Question: *The Cow Creek Band of Umpqua Tribe of Indians tribal representative asked if comments were written down from the DSL meeting with them held in late 2019 or early 2020?* DSL sent the meeting notes to Jason Robison with the tribe; DSL will send them to Heather as well.

Question: *Which line source is being used for tidal data? highest measured tide or highest mean tide? Or 50% exceedance?* Peter Ryan - expert on jurisdiction with DSL- responded that 50% exceedance is shown in purple or magenta on the map and showed the workgroup how to use the dropdown menu to see this. 50% exceedance is from NOAA data from over 30 years; not a guarantee but a good approximation.

When it is complete, DSL will get the map posted to the webpage with full explanation/legend.

DSL has a meeting scheduled with DLCD this week to discuss the coastal zone boundary relative to states coastal boundary and state 404 permits; DSL does not have information to share now but will at the July workgroup meeting.

### **Tribal Consultation Update**

DSL received a letter back from the CTUIR in January 2020. The issues as DSL understands them (as itemized on the meeting agenda) were read through. DOJ explained Federal Trust Responsibility; DSL is looking at how the state can have a similar relationship.

DOJ explained treaty rights.

ESA: the concern being that the state 404 permit Section 7 is not triggered as state permit is not a federal action. DSL is working on establishing equivalencies.

DSL discussed Sovereign Immunity.

### **State Budget Vulnerabilities**

DSL and EPA agree that any state or federal agency has budget vulnerabilities.

DSL is taking time going through the issues raised in communications with the CTUIR; once response is written to CTUIR and DSL is able to talk with them again, DSL will post the letter to the webpage. DSL would like this discussion to occur with other tribes to increase depth and awareness of other issues; the tribal Natural Resource Cluster asked DSL to their August meeting to further discuss these issues.

Question: *LWVOR asked if there was any assurance that the state has adequate resources?* DSL responded that all work is subject to legislative funds. When statute is driving us (DSL), there is a legal obligation to pursue this; DSL is looking at ways to reduce the burden on the Common School fund; LWVOR pointed out that in the future, this program could be moved to another agency with the state that cannot access the Common School Fund.

A CTUIR representative discussed sovereign immunity and the federal responsibilities.

Question: *What is the plan to receive feedback from other tribes?* DSL is hoping for more input orally or in writing from tribes, and in tribal forums; DSL sent a letter to tribes to engage on 404 assumption and still welcomes a response.

Question: *The Coquille tribal representative asked what date that letter was sent to tribes and from whom it was sent?* DSL responded that we don't know offhand what the date was and will have to locate the letter and can post it on the website.

## **ESA Update**

This effort has been ongoing (off and on) since 1995; the question being how is the state going to provide an equivalent to the Section 7 consultation that the Corps is currently doing? In 2013/2014 EPA paid to facilitate the conversation with the Services to investigate what are ways the state can grapple with this? A report was issued in 2014, and DSL is still following the requirements of that report at this time.

Another development is that EPA publicly requested comments to the federal register as to when EPA gives a state authority, is that a discretionary or non-discretionary authority?

Florida is actively pursuing assumption and presented a "white paper" to EPA HQ. There is a link to the paper on the agenda and the paper will be posted to the DSL 404 webpage. Comments are being excepted until July 6. EPA cannot speak on the topic as it's posted in the rule; the timing is a predicament as assumption rules are in process.

Question: *What is DSL's position?* DSL does not have one yet.

DSL is currently working on a MOA and process flowchart (from Michele Weaver ODFW, working part time for DSL), then will reach out to the Services in a month or two; this is linked to the 404g rule issuance allowing partial assumption.

Question: *What is tribal engagement on Section 7? If this passes it won't be federal oversight anymore and tribes are linked to federal treaties not state.* EPA stated that this is also a topic they are looking at in the new 404g rule, opportunities for tribes to be engaged. EPA wants tribes to have all the provisions to be able to comment on state permits and is also looking at backup mechanisms. DSL stated that state applications have to be compliant with ESA conditions the permit denied; they are not getting around ESA. All parties agreed there will be much further discussions on this...

Michele Weaver (ODFW, working part time for DSL on ESA issues)-introduced herself. DSL will address this more in the July workgroup meeting; hope to have a flowchart by then.

## **BREAK**

DSL discussed that HAGLU submitted what became HB2436 which was signed by the governor last July or August. Part of this was mandating DSL to look at partial 404 assumption specifically; ORS 196.795 says DSL shall continue streamlining and may look at partial assumption. HB2436 is the latest report to the legislature. Five criteria are set forth in the ORS to address streamlining: including reducing paperwork; eliminating duplication; and increasing certainty. These are the three criteria DSL must apply to any streamlining tool. Achieving this, DSL looks to stakeholders and tribes and a net series of meetings, asking the workgroup to comment relative to criteria.

DSL noted that on January 2, 2021 HB2436 will be repealed but the mandate for streamlining is still there in the ORS.

**Schedule-** attempted to share screen: tech difficulties as it is an email, cannot share.

November 4 report to HAGLU:

Each workgroup meeting from now to November, DSL will be producing a draft report. On July 1, DSL will have an outline for the report; August 5, DSL will take in comments after the July meeting and will then provide a 2<sup>nd</sup> draft of the report, and so on.

Question: *When does the workgroup meet?* Every 1<sup>st</sup> Wednesday of the month; workgroup members will receive a draft report, walk thru it, comment on it at the meeting and until the next workgroup meeting; the report is the best professional opinion on how the partial program does comply with the five criteria specified in the ORS.

This is not a draft submittal of the 404 assumption application to EPA; this legislative report won't have that depth and detail; we have to anticipate what statutory changes will be needed in 2021 to comply with EPA requirements.

Question: *LWVOR stated that the report provides the legislature with DSL conclusions, but will it also share issues that have come up by the workgroup, so the legislature has full understanding of workgroup conversations? And also, there is a four billion dollar shortfall for 2021.* DSL cannot predict what the legislature will do, and DSL would like to reconcile issues before presenting to the legislature; some uncertainties won't be known until we start into the program.

- Post meeting notes and recording to webpage,
- Resend Teams invitations for 2020 to workgroup,
- Have Jason Robison approve forwarding of notes to Heather with Cow Creek tribe
- Post "tribal letter" sent to tribes last year to engage on 404 assumption
- Florida's "white paper" to EPA
- Update the Workgroup roster & email group
- Send out solutions to microphone issues

**Next meeting Wednesday, July 1<sup>st</sup>, 2020.**

2:50 taping